No. 3007.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,

Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

PETITION FOR REHEARING

BEVERLY L. HODGHEAD,
Attorney for Western Union Telegraph Company,
Plaintiff in Error.

ALBERT T. BENEDICT, of New York,
Of Counsel.

Filed this..........day of March, A. D. 1918.

F. D. MONCKTON, Clerk,

By..........Deputy Clerk.

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PETITION FOR REHEARING.

To the Honorable Justices of the Circuit Court of Appeals of the United States, in and for the Ninth Circuit:

After careful examination of the opinion of the Court rendered in this cause, we respectfully petition the Court for a rehearing upon the following grounds.

We trust that we are not going too minutely into the important questions involved than is directed by the rule in regard to petitions for rehearing:

THE CONTRACT OF SALE.

First: We urge the Court was in error in holding that the contract with Pitt and Campbell was one from which the plaintiffs could withdraw at pleasure. On the contrary, as it contained *an agreement to buy,* it was a contract which Pitt and Campbell had a right to enforce and the condition regarding default did not affect that right.

In interpreting this contract, the Court, in its opinion, says (page 7):

> "When default occurred immediately the authorization to deliver became effective, forfeiture accrued and all rights of Hastings and Lange and Pitt and Campbell under the contract ceased and became determined."

We respectfully contend that this is not consistent with the language of the contract. While it is true that the *"authorization"* became effective upon default, that is, the bank, upon default, was *authorized* to deliver, yet the rights of the parties did not cease when the bank became clothed with the authority to deliver but when that authority was exercised and delivery made.

The Court, however, holds that it became the *duty* of the bank to return the stock upon default in

payment, or, in other words, that it was *required* to deliver it. But such is not the contract. There is no requirement that the bank deliver it. There is no provision that upon default the bank *shall* return the stock, but only that the bank is authorized or, in other words, that it *may* return the stock upon default, and that "thereupon," clearly meaning upon the return of the stock, all rights shall cease. The Court has said that "thereupon" relates to the default and that it then became the duty of the bank to return the stock and Pitt and Campbell had no alternative but to accept it. But we earnestly insist that the word "thereupon" means, and was intended by the parties to mean, that the rights of the parties should cease and determine upon the *return of the stock*. This is clear for the following reasons: There was no need for Pitt and Campbell to authorize the return of the stock *upon default* in payment. The stock was their property anyway. They had the right by *ownership* to its return upon default in payment without agreement or authorization from themselves. But while Pitt and Campbell had the right to take the stock, *they also had the right not to take it, but to insist upon the enforcement of the contract and the payment of the price which Lange and Hastings agreed absolutely to pay.*

These are the conditions subject to which Pitt and Campbell agreed to sell and Lange and Hastings agreed to buy. To hold that the absolute agreement

of Lange and Hastings to buy the stock and to pay the stipulated price therefor was made upon condition that they could withdraw if they chose means only this: That they agree to buy subject to the condition that they buy, or that they agree to pay provided they pay, and they are not deemed to have agreed to pay if they do not pay, which, of course, means nothing. This construction is opposed to the decision of the Supreme Court of the United States in

Stewart v. *Griffith,* 217 U. S., 323,

cited at page 27 of plaintiffs' opening brief on appeal and the other cases cited, as follows:

Wilcoxin v. *Stitt,* 65 Cal., 596;
Central Oil Co. v. *Southern Refining Co.,* 154 Cal., 165;
Weaver v. *Griffith,* 59 Atl., 315;
Vickers v. *Electro Zoning Co.,* 48 Atl., 606;
Hamburger v. *Thomas,* 118 S. W., 770.

Also

Shenners v. *Pritchard,* 104 Wisc., 291;
Dunn v. *Yakich,* 61 Pac., 926.

The above are practically all of the adjudicated cases interpreting contracts containing provisions for a forfeiture of the rights of *all parties* upon default in payment, in connection with the absolute *agreement of the purchaser to buy* the property and to pay the

price, except the case of *Ramsey* v. *West* from an intermediate court of appeal in Missouri. The case of *Williamson* v. *Hill,* cited in the opinion, as will hereafter appear, *did not contain an agreement to buy* at all, and is therefore not in point. The Ramsey case is opposed to all precedent and is also distinguishable from the case at bar as will also later appear from this petition. The group of cases above cited hold in effect, as was stated by Mr. Justice Henshaw in *Central Oil Co.* v. *Southern Refining Co.,* 154 Cal., at page 167:

> "A promise which is made conditionally upon the will of the promisor is generally of no value, for one who promises to do a thing only if he pleases to do it is not bound to perform it at all."

The rule of these cases, beginning with *Stewart* v. *Griffith,* 217 U. S., 323, is not disputed by the opinion of the Court in this case. The *Stewart* case, however, is distinguished by this Court from the case under consideration, because, as 'tis said, it was "a contract of sale of real estate." There was substantially no difference in the nature or language of the contract itself. The Court in the Stewart case determined that the purchaser did agree to buy and to pay the price. The contract provided that if the price was not paid the contract was "to be null and void and of *no effect in law.*" But, says the Court here, the contract in the Stewart case related to the sale of real estate, and the

contract in this case was a contract usual in mining sections relating to the development of mines.

We again not only respectfully contend that the meaning of the parties is to be ascertained from the language of their contracts rather than from the subject matter of their dealings, but besides that, may we direct the Court's attention to the fact that there is nothing in this contract or in the pleadings to show that the agreement with Lange and Hastings related to the development of mines or that they were investors, as the Court says, taking "the chance that upon developing the property involved he may find his hopes rewarded." In placing this contract in suit in the class of contracts described, as development contracts, the facts assumed are not in the record. And yet even in mining contracts *where the purchasers agree to buy,* they cannot be relieved from that obligation by their own default because the property has not developed as hoped for.

THE CONTRACT IN QUESTION WAS FOR CORPORATION STOCK AND NOT FOR A MINE.

In the contract with Lange and Hastings, there is nothing to show that any development of property was involved or that the payments were dependent upon any prospective development. There was no "chance to be taken." It was not an option nor a bond on a mine. It was a contract for the *purchase* and *sale* of shares of corporate stock, which does not

even indicate in any manner what proportion of the stock it represented in the corporation nor that it had any relation to the control or operation or development of a mine.

It is true, as the Court says, "abandonment and forfeiture gave Pitt and Campbell the right to their stock." We have never disputed that right, but the right did not come from the contract but arose from their ownership of the stock. It is true they had the right to take it upon the purchasers' default, but they also had the right not to take it.

While they had the right to take the stock, the exercise of that right was with Pitt and Campbell and not with Lange and Hastings, who were in default, nor with the bank.

The case may be stated in another way. Let the facts be that Lange and Hastings failed to pay the $11,250, which they agreed to pay on May 1st. Pitt and Campbell, instead of retaking the stock, sue Lange and Hastings for the amount of this payment. Could they recover? Could Lange and Hastings say, we never agreed to pay if we did not pay. Did the right of Pitt and Campbell cease upon the default, or would it cease only upon the exercise of their right to the stock?

Referring again to the nature of the contract; it related to the purchase and sale of mining stock, not a mine. Certainly there can be no difference in the construction of such a contract than if it related to any

other kind of corporate stock, as stock in a land corporation. Would there be a difference in the meaning of two contracts exactly alike in terms because one relates to land and the other to corporate stock?

We respectfully urge that the Court erred in classifying this contract as a contract relating to the development of mines where the investor takes the chance of having his hopes rewarded, or his choice of defaulting in payment and losing what he has expended.

We think the distinction asserted between this case and *Stewart* v. *Griffith* is not sound, that is, if this is not such a mining contract as described, then we think *Stewart* v. *Griffith* and the like cases referred to are authority and controlling of the issue.

The Court cites two cases, namely:

> *Ramsey* v. *West,* 31 Mo. App., 676;
> *Williamson* v. *Hill,* 27 N. E., 1008; 154 Mass., 117.

Neither of these cases arose in mining sections and neither related to mines. *Ramsey* v. *West,* like *Stewart* v. *Griffith,* was a contract of sale of real estate. Both these cases related to the same thing. The forfeiture clause was practically the same in each case and both contracts contained an express covenant to buy. The only trouble with *Ramsey* v. *West,* decided by an intermediate court of appeal in Missouri, is,

that it is in direct conflict with the Supreme Court of the United States in the Stewart case.

In *Williamson* v. *Hill* there *was no agreement to buy at all.* The plaintiff agreed to sell and the contract stated the terms and conditions of the sale, but contained no agreement by the defendant to buy. The forfeiture clause provided that if the payment was not made when demanded the contract was to be void "and the patents shall revert to Williamson."

The nature of the contracts in *Stewart* v. *Griffith* and the other cases cited, are fully set out in our opening brief at pages 27 to 36. The case from the Supreme Court of Pennsylvania, namely,

Weaver v. *Griffith,* 59 Atl., 315,

contained a provision fully as comprehensive as in this case that upon default in payment

> "The agreement is to be null and void *and all parties* are to be released from *all liabilities* hereunder and all money previously paid forfeited."

Practically the same language is found in the case of

Hamburger v. *Thomas,* 118 S. W., 770.

I call the Court's attention to one case which was not in our former brief, namely,

Shenner v. *Pritchard,* 104 Wisc., 291.

There was a provision in the contract in that case that after a forfeiture had occurred by default in payment, the contract could be revived or renewed by the parties, or by the first party, but it will be seen by an examination of the entire opinion that the case did not turn upon this point alone, but it was a construction of a contract wherein the *purchasers agreed to buy* subject to the condition that if payment were not made "this agreement shall henceforth be utterly void." After default in payment, the sellers sued for the price. It was contended by the purchasers that if they failed to make the payments, the agreement was to be "utterly void for all purposes," "and no action at law could be maintained thereon," and that

> "Thus, it would be left at the option of the vendee in the contract to terminate it at any time he saw fit, by simply failing or refusing to pay any further installments due thereon." Citing a case from 4 Atl., p. 830.

The Court says:

> "This decision is opposed to the great weight of authority, as we shall see, and has no support in reason or justice. Suppose, after the contract had been executed, the defendants became dissatisfied with their bargain, and they had refused to make the first payment; could it be claimed that they could then forfeit the contract? The forfeiture clause is that, if they fail to make the payments at the time and the manner specified

it shall be void. They agreed to pay a cash payment of $100.

" 'What, then, was the meaning of the parties when they entered into this contract? Did they intend it should be a *felo de se,* or that the defendant below might make it so, or valid and operative, at his election? What inducement could the plaintiff below have had for making such a contract? The covenants of the defendant below were absolute, and on his performance the plaintiff below would have been bound; but the clause providing for a forfeiture of previous payments was totally inoperative until at least one payment made. The whole clause providing for the vendor's discharge from his covenants and the forfeiture of the vendees' payments is clearly a condition in favor of the former, not the latter. The vendee was bound to pay at all events. If he had failed, even after having made payments, the vendor might consider the contract at an end, and sell the land to another. If, however, he chooses not to do so, but holds the vendee to the contract, he has undoubted right to enforce it by compelling payment. A contrary doctrine would be allowing the vendee to take advantage of his own negligence, without any advantage to the vendor, but, rather, an injury, as he is in the meantime prohibited from selling the land to any other purchaser.'

"A review of this case leads to the conclusion that this clause in the contract leaves it for the vendor to say whether he will declare the contract void or not, and that he may elect to sue

> for the unpaid purchase money or for a specific performance of the contract, or to declare the contract at an end."

We repeat that with the exception of *Ramsey* v. *West,* the authorities all agree that in contracts where the *purchaser agrees to buy,* the seller has the right to enforce payment after default. But this case possesses the additional feature that the contract clearly provides that the rights of the parties are to cease not upon the default but upon the return of the stock. If this is true, it matters not whether the stock was actually returned or not (and it will be observed that there is no evidence here that it was returned), because the liability of the defendant was not dependent upon any subsequent act of the bank. If Pitt and Campbell had a right under the contract to enforce payment, they retained that right until it was shown they lost it by themselves retaking the stock.

PRIVATE AGREEMENT WITH THE BANK WAS NOT BINDING UPON DEFENDANT NOR UPON PITT AND CAMPBELL.

Second: The agreement in question provides that the payments are to be made to the bank as the agent of Pitt and Campbell. If the arrangement with the bank for cashing plaintiff's drafts, as found by the Court, had not been made, and the draft had been mailed to the escrow holder as the agent of Pitt and

Campbell, to apply upon the payment, the mailing of the draft and the letters of instructions therewith would have been an acceptance of the offer and would have made the contract an absolute one, even if prior to that date it had been only optional. The making of the private arrangement with the bank does not in any way affect this acceptance. The pleadings, the letters, and the evidence show the draft was sent to the escrow holder to apply on the payment, without reference to any private arrangement. See Opening Brief, pages 44 to 47.

THE DEFENSE BASED UPON THE MESSAGE CONTRACT.

Third: The charge against defendant here was delay in delivery of a telegram.

The Court in its opinion holds that the stipulations on the message blank with respect to repeated messages cannot be construed to apply to the case of delay, basing its ruling chiefly upon the case of

Box v. *Postal Tel. Co.,* 165 Cal., 138.

We contend that upon the record of this case the decision in *Box* v. *Telegraph Co.* is directly in point for the defendant for this reason. As stated in the opinion in this case, page 10, referring to the Box case, this Court said:

> "The regulation of the company with respect to repeated messages while purporting to be made to guard against mistakes or delays should be

construed to refer to such mistakes and *delays as could be corrected or avoided by repetition and comparison;* otherwise a delay caused by the conduct of the company in negligently failing to send or attempt to send the message would come within the rule."

In the Box case the Court did not decide that the stipulation did not apply to delays, but on the contrary that it does apply to delays which could be corrected or avoided by repetition. What is the case here?

In the Box case the message was never sent at all. It was held by the Court, therefore, there was nothing to compare nor repeat, but on the other hand, the conduct of the company made it impossible for the message to be repeated. The case, however, held, as quoted by the Court in this case, that the stipulation does include such *"delays as could be corrected or avoided by repetition."* The delay in this case is one which a repetition would have avoided and to support this statement, we respectfully refer the Court to the findings of the District Court, Finding XV (Tr., p. 58). The message was filed at Oakland, California, to be sent to Yerington, Nevada. It was found by the Court that the message failed between Reno and Wabuska, two intermediate stations in Nevada. The message was promptly transmitted from Oakland to the first relay station at Reno. It is shown by the Agreed Statement of Facts that it reached Reno prior to hour of 9:30 p. m.

(Tr., p. 70). It was forwarded from Reno to Wabuska by the operator Collins at 9:56 (Tr., p. 120). But the Court found that it did not reach Wabuska. It failed, therefore, between these two intermediate points. If the message had been repeated from Wabuska, the repetition would have shown that the message had reached Wabuska. The failure to get a repetition from Wabuska would have shown that it did not reach that point, and the sending operator would therefore have been advised of the delay. All of the cases, including the Box case, admit that the stipulation applies to such delays as would be avoided by repetition. In the case of

> *Union Construction Co.* v. *Western Union,* 163 Cal., 298,

also cited in the opinion, the Supreme Court of California states the rule thus, at page 316:

> "For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message *from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee."*

This is the rule followed by the Interstate Commerce Commission which by the terms of the amendment to Interstate Commerce Act, now has jurisdic-

tion to determine the reasonableness of the stipulations in the message blanks now in question. See case of

> *Cultra* v. *Western Union,* 44 I. C. C., 679,

cited in our former brief at pages 67-71.

The case of

> *Western Union* v. *Coggin,* 68 Fed., 137,

decided by the same Circuit which gave the opinion in the Box case, held that the telegraph company was exonerated from liability under the terms of the stipulation, although there was no error of transmission, but the loss was caused solely by *delay.* See also

> *Clement* v. *Western Union,* 137 Mass., 463;
> *Birkett* v. *Western Union,* 103 Mich., 363;
> *Stone* v. *Postal Telegraph Co.,* 76 Atl., 762,

cited on pages 62 to 64 of defendant's opening brief.

The correct rule, therefore, drawn from all the cases seems to be that the stipulation includes delays which would be corrected "or avoided by repetition," but does not include delays which would not be corrected or avoided by repetition. In the Box case, the Court held that the delay involved could not have been corrected by repetition because the message was never sent at all. In *Union Construction Co.* v. *Western Union, supra,* the Court held that repetition would not have tended to correct or avoid the delay because the transmission of the message had been

completed and the delay was in the delivery at the terminal office after transmission was complete. But in this case the delay is probably the only delay which the repetition would correct and avoid, that is, a delay occurring at an intermediate point of which the sending office would be immediately advised by failure to receive the repeated message. We respectfully contend that the decision is not in accord with the authorities upon which it is based, but in effect denies the application of the stipulation to all delays whether they could have been corrected or not by the repetition of the message. In the case of *Postal Telegraph Co.* v. *Nichols,* cited in the opinion of the Court, the sending office knew of the delay but did not correct it.

THE ALLEGED ORAL CONTRACT OF INSURANCE.

Fourth: The Court holds that the defendant, for the additional consideration of 45c made an oral contract of insurance "specially to deliver the message at Yerington." Such contract defendant's agent had no authority to make, for this reason: It was necessary for the message in order to reach Yerington to be forwarded over the line of another company (see Stipulation of Facts, Tr., page 68). The stipulations upon the message blanks, subject to which the message was transmitted and by which the plaintiffs were bound, provided that the message, if necessary to be forwarded over the lines of another company, is to be so sent "without liability." In such case the agent had no

authority to make any contract of insurance of the delivery of the message either oral or written (Tr., p. 54). Plaintiffs were bound by the terms of the message contract whether they read it or not.

> *Primrose* v. *Western Union,* 154 U. S., 125;
> *Postal Telegraph Co.* v. *Nichols,* 159 Fed., 643-647.

In the case last above cited, the Court of Appeals of this Circuit, at page 647, said:

> "We attach no consequence to the testimony of Nichols (the plaintiff) to the effect that he did not read the printed matter on the front or back of the blank upon which he wrote the message and that his attention was not called to such matter."

In the case at bar, the Court, page 5 in the Statement of Facts, quotes this language:

> "The Court finds that neither Hastings nor Lange read the printed matter on the blank and did not know its terms and that the agent of the company did not call their attention to the printed matter."

We ask that this language be stricken from the opinion, as it is a finding upon an immaterial matter and one as to which this Court in the Nichols case stated, "We attach no consequence." The language, if it remains in the opinion would be misleading and result in the contention that senders of messages were

not bound by the printed matter upon the blanks of the telegraph company if they can say they did not read it and their attention was not specially called to it.

It is true that the Court found the delay occurred upon the line of the defendant and not upon the connecting line. On the question of negligence the consideration of that fact may be appropriate, but in relation to the insurance contract it matters not where the negligence occurred. The question is whether the defendant's agent had authority to make any such contract as the Court found was made. If not, the defendant is not liable for damages no matter where the negligence occurred.

We urge that under the terms of the stipulation where the message was necessarily to be forwarded over the lines of another company it was without the power of the agent of the defendant to make an oral contract of insurance.

Although there was a written contract between the parties which they are deemed to have read and consented to and by which they are bound and subject to the conditions and terms of which it was expressly agreed the message was sent, the Court holds that the plaintiffs may show they sent the message under an oral contract. If this may be done in this case, it may likewise be done in any case, and the written stipulations thus be superseded by any oral agreement made with the receiving clerk of a telegraph company which suitors may be able to establish.

GROSS NEGLIGENCE.

Fifth: The Court held that the delay of three days at Wabuska, in view of the detailed explanation to defendant's agent as to the purpose of the telegram, proved gross negligence. An unexplained delay of three days might be gross negligence, but a delay of one hour would certainly not be. We do not think it was proper for the Court to consider the time which elapsed after the money was paid. The message could not under any condition have reached Yerington before the morning of April 30th. If it was delayed until the bank opened at 8:30 or 9:00 o'clock, it would have failed of its purpose. If it were shown that the telegraph company, with all due diligence, could not have delivered the message before the bank opened, by reason of disturbance upon the lines or for any physical cause, there would have been no liability in this case because there was a delay of three days after the message should have gone through. If any liability was incurred at all, it accrued when the bank received the draft on the morning of April 30th and credited to account of Pitt and Campbell. Negligence which occurred subsequent to the loss cannot be charged against the company. If by reason of storm, or other disturbance, the message could not have reached the bank before the opening hour on April 30th, there could not possibly be any liability upon the telegraph company, even though after the draft was paid the message had been delayed for a month or not deliv-

ered at all. We respectfully contend, therefore, that the Court erred in finding gross negligence against the Company based upon the delay which occurred after the time the draft was paid, which was practically the entire three-day period.

INTEREST.

Sixth: We earnestly contend that the Court was in error in allowing interest upon the damages awarded. The Court says the real question was simply whether the defendant was originally liable for $11,250, that being the amount of the draft. But the amount of the draft was not at all the necessary measure of damage. The damage was not either "in the sum named or for nothing," as said by the Court, but may have been for any amount between the sum named and nothing, dependent upon the determination of the issues made by the pleadings as to the question of value. The Court says that no benefit of any kind accrued to the plaintiffs and there was no offset to be allowed against the loss. But the defendant pleaded facts and offered evidence to show that there was an offset and a benefit to the defendant and the question whether or not the damage was the amount of the draft or nothing, or in some other immediate sum, was a question that could be ascertained and determined only by the judgment of the Court. We are not contending that the plaintiffs were required to complete the purchase in order to determine the amount of the damage, but

we do assert that the defendants had a right to show the value of the property in order to determine what, if any, the damage was. For these reasons the Court below ruled that the damages were not *ascertained* when the alleged act of negligence accrued, but could only be *determined and fixed by the judgment of the Court* from the evidence, and it was therefore not a proper case for the allowance of interest. We think this ruling was correct.

For the reasons herein stated, we respectfully petition this honorable Court for a rehearing of this cause.

Respectfully submitted.

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ALBERT T. BENEDICT, of New York,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is not filed for delay and in my opinion is well founded in point of law.

BEVERLY L. HODGHEAD,
Attorney for Western Union Telegraph Company,
Plaintiff in Error.